No. 83-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE LAWLESS,

Petitioner,

v.

ROBERT PIERCE, MARY LOU MARZUKI, ARLENE KAGANOVE, EUGENE SCHWARTZ, FRED HENIZE, TIM WARREN, CHARLES NOTARUS, JOE MEREDITH, JON MENDELSON, THORN CREEK PRESERVATION ASSOCIATION, VILLAGE OF PARK FOREST, VILLAGE OF PARK FOREST SOUTH, FOREST PRESERVE DISTRICT OF WILL COUNTY, AND OTHERS WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioner, Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Is an adjudicated right of exclusive possession, during condemnation, a property right of the landowner protected by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 15, of the Illinois Constitution?

2. Is a person in adjudicated possession of property required, under the United States and Illinois Constitutions, to share his exclusive possession with the public, without redress or compensation, during the period of condemnation proceedings?

3. Can the doctrine of election of remedies, a rule of substantial justice, be

applied to deprive a litigant of his constitutional right to just compensation for the taking of or damage to his property?

4. When two highest courts of a state make opposite rulings on the same facts which destroy a constitutional right, is review warranted?

5. May possessory rights to private property be taken or damaged for public use for two and one half years without compensation by a simple de facto dedication ceremony?

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The Petitioner, Lawrence Lawless, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court,

First Judicial District, the state court of last resort. Petition for Leave to Appeal was denied by the Illinois Supreme Court on January 31, 1984.

OPINIONS BELOW

The Circuit Court of Cook County, Illinois, dismissed petitioner's amended complaint and suit by final judgment order entered on July 14, 1982. The Illinois Appellate Court, First District, entered its modified judgment on denial of petition for rehearing, which affirmed the dismissal of the trial court, on November 1, 1983. Lawless v. Pierce, (1983), 118 Ill. App. 3d 747. The Illinois Supreme Court denied petition for leave to appeal on January 31, 1984 Lawless v. Pierce (1984), 99 Ill. 2d (18).

JURISDICTION

Pursuant to denial of leave to appeal by the Illinois Supreme Court, the decision of the Illinois Appellate Court, First District, became a "final judgment*** rendered by the highest court of a State in which a decision could be had***" pursuant to the provisons of 28 U.S.C. Section 1257.

The jurisdiction of the court is invoked under the provisions of 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall private property be taken for public use, without just compensation."

Article I, Section 15, of the Illinois Constitution of 1970 provides:

> "Section 15. Right of Eminent Domain
>
> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law."

STATEMENT OF THE CASE

The petitioner is a landowner whose private property was desired and ultimately taken for public use.

On June 4, 1978, respondents (public entities, a not-for-profit association and individuals representing public entities through a commission established for that purpose) in concert with the State of Illinois, declared petitioner's private property to be public in a de facto dedication ceremony to which the public was invited.

The factual background of the case is well summarized by the Illinois Appellate Court, First District, in its Modified Opinion, and, for brevity, is not repeated here. Lawless v. Pierce, (1983), 118 Ill. App. 3d 747, (Appendix A, at Opinion Pages 749-750).

The actions of the respondents and the state resulted in mandamus and eminent domain litigation and this suit against respondents. The mandamus and eminent domain suits, and this litigation, rest upon the same set of facts. The issues presented by this petition require consideration of the rulings of the court below as well as prior rulings of the Third District Illinois Appellate Court in the consolidated appeal of the mandamus and eminent domain suits. Dept. of Conservation v. Lawless, (1981), 100 Ill. App. 3d 74, (Appendix C).

Petitioner's suit against respondents is upon counts of trespass, willful trespass, conspiracy under the Illinois Antitrust Act and conspiracy at common law. Lawless v. Pierce, (1983), 118 Ill. App. 3d 747, 750 (Modified Opinion, Appendix A).

The gist of petitioner's amended complaint was that on June 4, 1978, the respondents jointly and severally sponsored, advertised and invited approximately 1,000 members of the public to a public dedication ceremony at which petitioner's private property was portrayed as a public nature preserve; that thereafter members of the public trespassed against petitioner's property and that the trespasses continued for more than two and one half years until January 28, 1981 (the date a condemnation award was paid). Lawless v. Pierce, (1983), 118 Ill. App. 3d 747, 749-750 (Modified Opinion, Appendix A).

Proceedings In the Court Below (Appendix A)

The Illinois Appellate Court, First District, entered its judgment and modified opinion on November 1, 1983 (Appendix A).

The decision affirmed a judgment of the Circuit Court of Cook County which dismissed petitioner's amended complaint and suit. The Supreme Court of Illinois denied appeal on January 31, 1984 (Appendix B).

Proceedings In The Illinois Appellate Court, Third District (Appendix C)

After the de facto dedication ceremony the petitioner obtained a judgment in mandamus against the State of Illinois. The mandamus judgment included findings that the public dedication ceremony of June 4, 1978 was a "taking" and "physical invasion" of petitioner's private property. Dept. of Conservation v. Lawless, (1981) 100 Ill. App. 3d 74, 79 (Appendix C).

Condemnation proceedings resulted, an award was made and both parties appealed. The Third District Illinois

Appellate Court affirmed the mandamus judgment and findings of inverse condemnation which established a taking date of June 4, 1978, but denied petitioner's claim for pre-judgment interest during the period from June 4, 1978, until the condemnation award was paid on January 28, 1981. Dept. of Conservation v. Lawless, (1981), 100 Ill. App. 3d 74, Opinion Pages 78-80, 82 (Appendix C). The Third District Illinois Appellate Court declined to award pre-judgment interest because it held that mandamus findings of "taking" and "physical invasion" did not dispose of the issue of the taking of "possession" and because Lawless continued to occupy the property during this period and had actual physical possession. Dept. of Conservation v. Lawless, (1981), 100 Ill.

App. 3d 74, 78-80, (Appendix C). The Supreme Court of Illinois denied appeal. Dept. of Conservation v. Lawless, (1982), 88 Ill. 2d 550.

The Opinion Of The Court Below (Appendix A)

The Illinois Apellate Court, First District, recognized that the Third District Illinois Appellate Court, in the prior proceeding, had held petitioner to be in actual possession of his property from the extra-judicial public dedication ceremony of June 4, 1978, until payment of the compensation award by the state on January 28, 1981. It further acknowledged that the Illinois Appellate Court, Third District, had rejected petitioner's claim for pre-judgment interest for a claimed "taking" of possession during that period and had excluded this claim from the compensation award. Lawless v. Pierce,

(1983), 118 Ill. App. 3d 747, 750-751, (Modified Opinion, Appendix A).

The First District Illinois Appellate Court further held that although the trespasses commenced at the time of the extra-judicial dedication ceremony and continued during the period of petitioner's adjudicated possession and until payment of the compensation award on January 28, 1981, any damages for such trespasses were included in the compensation award. Lawless v. Pierce, (1983), 118 Ill. App. 3d 747, 751-752, (Modified Opinion, Appendix A).

The court below held that plaintiff had received satisfaction and was attempting to seek compensation twice, contrary to the doctrine of election of remedies. (Modified Opinion, Pages 752-754, Appendix A).

The First District Illinois Appellate Court further held that the two prior causes of action (the mandamus and eminent domain suits) and the trespass and conspiracy actions which form the subject of this appeal, were inconsistent and not consistent remedies, that petitioner's prior mandamus action against the Director of Conservation operated to bar petitioner's suit against these other respondents (who were not parties to the eminent domain proceedings) and that constitutional requirements of "just compensation" for taking or damage were satisfied. (Modified Opinion, Page 753 Appendix A).

Federal Questions Presented

Constitutional questions in this litigation were first presented upon the trial court's dismissal of petitioner's

amended complaint. Petitioner at that time was deprived of any remedy for either taking of or damage to his possessory rights during the two and one half year condemnation period. He raised those issues, upon constitutional grounds, in the Illinois Appellate Court, First District, claiming that the Fifth Amendment to the United States Constitution and Article I, Section 15, of the Illinois Constitution of 1970 required that petitioner receive just compensation when his possessory rights to private property were taken or damaged for public use. The court below considered and denied this claim. Lawless v. Pierce, (1983), 118 Ill. App. 747, 750, 753, (Modified Opinion, Appendix A).

(An expanded Statement of Facts with record references is contained in Appendix D).

ARGUMENT

Two highest courts of the same state (the Illinois Appellate Courts of the Third and First Districts became the highest courts of the state when the Illinois Supreme Court denied both appeals) have rendered decisions in opposition on the same set of facts.

As a result, the petitioner has been denied rights to "just compensation" in eminent domain, as guaranteed by the Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, and as further guaranteed by the Illinois Constitution of 1970, Article I, Section 15.

The decision of the court below determines an important question of constitutional property law in conflict

with all applicable decisions of the Supreme Court of the United States pertaining to property rights, as guaranteed by the Fifth and Fourteenth Amendments.

The basic issue is whether or not a property owner, in adjudicated actual possession during condemnation, has possessory rights which are protected by the constitutional guarantees. The thrust of the decision of the court below is that a person in possession of property may not defend that property against invasion by members of the public and other public bodies where he has by mandamus sought to protect himself from the consequences of an initial wrongful invasion by the state.

Until now it has never been held by any court that a landowner who files a

mandamus action to force inverse condemnation, where an illegal taking has occurred, is stripped of his power to protect his property and possession from invasion by the public, caused by illegal acts of other public bodies during the condemnation period.

I. A PERSON IN ADJUDICATED POSSESSION OF PROPERTY IS NOT REQUIRED, UNDER THE UNITED STATES AND ILLINOIS CONSTITUTIONS, TO SHARE HIS EXCLUSIVE POSSESSION WITH THE PUBLIC, WITHOUT REDRESS OR COMPENSATION, DURING THE PERIOD OF CONDEMNATION PROCEEDINGS.

This court has consistently upheld the right of a landowner to be secure against invasion or taking of his property, or possessory rights to that property, by extra-judicial acts of public entities. In San Diego Gas & Electric Co. v. San Diego, (1981), 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287, Brennan, J. (expressing the view

of other members of the court on the merits) said at 450 U.S. 651-652:

> "***This Court long ago recognized that '/I/t would be a very curious and unsatisfactory result, if in construing /the Just Compensation Clause/... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.' ***In service of this principle, the Court frequently has found 'takings' outside the context of formal condemnation proceedings or transfer of fee simple, in cases where government action benefiting the public resulted in destruction of the use and enjoyment of private property. E.G., Kaiser Aetna v. United States, 444 U.S. at 178-180, 62 L. Ed. 2d 332, 100 S. Ct. 383 (navigational servitude allowing public right of access);***"

See also Webb's Fabulous Pharmacies, Inc. v. Beckwith, (1980), 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446, at 449 U.S. 164:

"***a state, by ipse dixit, may not transform private property into public property without compensation***".

Where extra-judicial invasion and taking occurs the courts of Illinois have recognized the doctrine of inverse condemnation and the remedy of mandamus to accomplish that objective. People ex rel. Haynes v. Rosenstone, (1959), 16 Ill. 2d 513, 515-516; 158 N.E. 2d 577; People v. Kingery, (1938), 369 Ill. 289, 292-293; 16 N.E. 2d 761.

This court has held that where the invasion does not amount to a "taking", an action for trespass will lie to compensate the landowner or possesser of property for the damages caused by such temporary invasions by public entities. San Diego Gas & Electric Co. v. San Diego, (1981), 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287, at 450 U.S. 654:

"***The language of the Fifth Amendment prohibits the 'tak[ing]' of private property for 'public use' without payment of 'just compensation'. As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and 'the self-executing character of the constitutional provision with respect to compensation.' United States v. Clarke, 445 U.S. 253, 257, 63 L. Ed. 2d 373, 100 S. Ct. 1127 (1980), quoting 6 J. Sackman, Nichols' Law of Eminent Domain Sec. 25.41 (Rev. 3d Ed. 1980), is triggered. This court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation must be awarded.***".

(At 450 U.S. 657):

"***Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory.***".

Exclusive possession of property is an important strand in the bundle of property rights protected by the

constitutional guarantees. See Loretto v. Teleprompter Manhattan CATV Corp., (1982), 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164, where this Court said at page 73 L. Ed. 2d 882:

> "***The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See Kaiser Aetna, 444 U.S. at 179-180; see also Restatement of Property Section 7 (1936).***"

As a result of the acts of these respondents (admitted by motion to dismiss and for purposes of the appeal) the petitioner's adjudicated exclusive possession was destroyed and his property given to public use for two and one half years, without compensation.

Petitioner respectfully submits that the constitutional guarantees implicit in the Fifth and Fourteenth Amendments to the United States Constitution and

Article I, Section 15, of the Illinois Constitution of 1970, pertaining to the taking of private property for public use, require the payment of "just compensation" where any element of private property is taken or damaged for public use. The petitioner here was entitled either to pre-judgment interest for the "taking" of his possession or damages for public trespass. The Constitutions of the United States and the State of Illinois give him the right to one or the other of these elements of compensation, not both (and he did not seek both).

Under the decisions of the courts below he was given neither and thereby deprived of his constitutional rights.

II. AN ADJUDICATED RIGHT OF EXCLUSIVE POSSESSION, DURING CONDEMNATION, IS A PROPERTY RIGHT OF THE LANDOWNER PROTECTED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15, OF THE ILLINOIS CONSTITUTION.

Possession is a valuable property right protected by the United States and Illinois Constitutions. It may not be taken, encroached upon, trespassed against or otherwise "damaged for public use" without payment of compensation. See San Diego Gas & Electric Co. v. San Diego, (1981), 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287; Devines v. Maier, (CA 7th, 1981), 665 F. 2d 138, 141-142 (where the court held that the destruction of a leasehold by regulation was a "taking"); Jacobs v. United States, (1933), 290 U.S. 13, 16, 78 L. Ed. 142, 54 S. Ct. 26 (intermittent overflow of water from a

government dam project was a partial "taking" of a servitude, requiring payment of compensation); Kaiser Aetna v. United States, (1979), 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (imposition of public use on a private easement was a "taking" requiring payment of compensation); Webb's Fabulous Pharmacies, Inc. v. Beckwith, (1980), 449 U.S. 155, 164, 66 L. Ed. 2d 358, 101 S. Ct. 446.

The Illinois Constitution and Courts have accorded possessory rights the same protection when "taken" or "damaged" for public use. Illinois Constitution of 1970, Article I, Section 15; Roe v. County of Cook, (1934), 358 Ill. 568, 571-572; 193 N.E. 472; Mt. Carmel Utility Co. v. Public Utilities Comm'n., (1921), 297 Ill. 303, 309; 130 N.E. 693; North Ill. Traction Co. v. Commerce Comm., (1922), 302 Ill. 11, 23; 134 N.E. 142;

People v. Rosenfield, (1943), 383 Ill. 468, 472; 50 N.E. 2d 479; The People v. Smith, (1940), 374 Ill. 286, 288-290, 29 N.E. 2d 274; The People v. Kingery, (1938), 369 Ill. 289, 292-293, 16 N.E. 2d 761.

In Loretto v. Teleprompter Manhattan CATV Corp., (1982), 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164, at 73 L. Ed. 2d 882, this court determined that the placement of two 4"x4"x4" metal boxes and 36' of cable was an invasion of the landowner's property right. In this case and for purposes of this appeal, it is admitted that public entities advertised plaintiff's private property as public, invited members of the public to trespass thereon and for a two and one half year period both the public entities and the public did so.

It is respectfully submitted that the right of a landowner, in possession of his property during condemnation, to protect that property against invasion and trespass by public bodies, and the public upon invitation of those public bodies, over a two and one half year period is even more important than the property right protected by this court in Loretto.

This decision, unless reversed, has enormous implications beyond Loretto. For the doctrine of election of remedies is a sword which cuts both ways. If, as the court below holds, the election of mandamus, in situations of extra-judicial physical "taking" through invasion of property, precludes actions for trespass against other public bodies during the condemnation period, then actions for trespass will likewise bar the landowner's

suit for mandamus. The landowner is then faced with a multiplicity of trespass actions without the power, through mandamus, to compel condemnation. See San Diego Gas & Electric Co. v. San Diego, (1981), 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287 at 450 U.S. 660:

> "***The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so. He may not be forced to resort to piecemeal litigation or otherwise unfair procedures in order to receive his due. See United States v. Dickinson, supra, at 749, 91 L. Ed. 1789, 67 S. Ct. 1382."

Where, as here, the invasion is a de facto public dedication of private property to public use, the consequences to the landowner will be disastrous. By the decision of the court below, nothing prevents the condemning authority from acquiring private property by a simple de

facto dedication process. If the landowner seeks mandamus the state and the public have the free use of the landowner's property during the condemnation period. If the landowner sues for trespass, he is faced with a multiplicity of actions over a period of years. The state and other public bodies can defend such actions in the courts of claim or courts of law and wear the landowner out. In the process the property of the landowner would become unsaleable, would never be condemned because mandamus was unavailable, and the condemnor would have successfully acquired the property without paying for it. This is the very danger of which Justice Holmes spoke in Pennsylvania Coal Co. v. Mahon, (1922), 260 U.S. 393, 415:

> "***We are in danger of forgetting that a strong public desire to improve the public condition is not enough to

> warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Unless the decision of the lower court is reversed, that danger will continue to exist.

At the conclusion of the appeal in the Illinois Apellate Court, Third District, petitioner was not at that time deprived of a constitutional right. By that decision he remained in adjudicated exclusive possession of the property and was entitled to defend that possession against trespassers, including these respondents. But petitioner's possessory rights in eminent domain were extinguished without redress or compensation upon the dismissal of petitioner's amended complaint. At that time petitioner's rights to <u>either</u> pre-judgment interest or for damage to his adjudicated possession were

destroyed. It was at the point of dismissal by the trial court that the constitutional guarantees established by the Fifth Amendment, operating through the Fourteenth Amendment to the United States Constitution, and Article I, Section 15, of the Illinois Constitution of 1970 were triggered. The petitioner presented these arguments to the Illinois Appellate Court, First District. Lawless v. Pierce, (1983), 118 Ill. App. 3d 747, 750 (Modified Opinion, Appendix A). The Illinois Appellate Court, First District, considered and denied petitioner's claim. It held that the constitutional requirements were satisfied and that petitioner had received "just compensation for the taking of his property". (Modified Opinion, Page 753, Appendix A).

Both decisions of the Illinois Appellate Courts (appeal having been denied by the Illinois Supreme Court in both instances) represent decisions of the highest court of the state based upon the same set of facts and deny to petitioner possessory rights guaranteed to him by the Fifth and Fourteenth Amendments and Article I, Section 15, of the Illinois Constitution of 1970.

III. THE DOCTRINE OF ELECTION OF REMEDIES WAS IMPROPERLY APPLIED BY THE COURT BELOW AND, AS APPLIED, DEPRIVES PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS.

The Illinois Appellate Court, First District, affirmed the dismissal of plaintiff's amended complaint and suit based upon Grunewald v. City of Chicago, (1939), 371 Ill. 528, 532, 21 N.E. 2d 739:

"Appellees had a right to sue at law for damage to their property or to proceed in mandamus to compel the proper officers to bring proceedings under the Eminent Domain Act. (People v. Kingery, supra.) They had a right to elect the remedy they thought best suited to the end sought, and satisfaction of the claim in one of the modes of recovery constitutes a bar to the other. Bradner Smith & Co. v. Williams, 178 Ill. 420."

The Doctrine Of Election Of Remedies As Described In Grunewald v. City of Chicago Does Not Fit The Facts Of This Case

The dicta in Grunewald applies only in a very limited situation. Its logic is based upon the fact that a party cannot both allege that the condemning authority has taken possession of the property and at the same time claim damages for trespass to that claimed possession which he no longer had. (Basic requirements of trespass law preclude an action for trespass where the

plaintiff has neither title nor possession). That situation does not exist in the case before this court. The Illinois Appellate Court, First District, in its modified opinion (Appendix A, Page 753) said:

> "We do not mean to infer, of course, that a cause of action for trespass cannot be based solely upon possession without legal title, since our courts have recognized that the gist of the action is injury to possession. Krejci v. Capriotti (1st Dist. 1973), 16 Ill. App. 3d 245, 247, 305 N.E. 2d 667, appeal denied, (1974), 55 Ill. 2d 605; see also, Advance Elevator & Warehouse Co. v. Eddy, (4th Dist. 1887), 23 Ill. App. 352, 355; 34 Ill. L. & Prac. Trespass Section 5 (1958)."

Petitioner continued to have possession and he was entitled to protect that possession. Until payment of the award, the state, all persons claiming under the state and these respondents, strangers, were trespassers. City of Crystal Lake v. LaSalle Nat'l. Bk., (1984), 121 Ill. App. 3d 346, 350, 356, _____ N.E. 2d _____.

The Unsuccessful Pursuit Of An Erroneous Remedy Against The Wrong Party Upon Mistaken Grounds Does Not Constitute An Election Of Remedies

The fact of petitioner's possession during the period of claimed trespasses has been adjudicated by the Third District Illinois Appellate Court in Department of Conservation v. Lawless, (1981), 100 Ill. App. 3d 74, 426 N.E. 2d 545, Appeal Denied, (1982), 88 Ill. 2d 550, and recognized by the First District Illinois Appellate Court (Modified Opinion, Page 751, Appendix A).

If petitioner had been awarded prejudgment interest by the Third District Appellate Court in the prior proceeding, then the doctrine of Grunewald would have applied. For then the state would have had possession, not petitioner, and petitioner could not have claimed trespass against these defendants.

However, the Third District Illinois Appellate Court held that findings of "taking" and "physical invasion" by the mandamus court did not include the taking of possession, which remained in petitioner. If the court below had fully considered the legal effect of these findings in and rulings of the Third District Appellate Court in Department of Conservation v. Lawless, (1981), 100 Ill. App. 3d 74, Pages 79-80, Appendix C), it could and should have applied the rule established by the Illinois Supreme Court in The People v. Marx, (1939), 370 Ill. 264, 270, 18 N.E. 2d 915:

> "***Nor is bringing an action upon a mistaken ground an election, since, if the party bringing the suit never had a cause of action, there is nothing upon which to base an election. (Chicago Title and Trust Co. v. DeLasaux, 336 Ill. 552).***"

See also 28 C.J.S. Election of Remedies, Sec. 12, Page 1080:

> "***where a party unsuccessfully attempts to exercise a right or remedy which he erroneously supposes he has, as where he mistakes the legal effect of an instrument or pursues a remedy against the wrong party, he is not thereby precluded from pursuing his rightful remedy."

When petitioner pursued his claim for pre-judgment interest in condemnation, it was based upon his belief that possession had been taken. The Third District Appellate Court rejected this contention and denied pre-judgment interest.

Where possession is "taken" before payment of the condemnation award, pre-judgment interest is the accepted measure of damages.

See Dept. of Public Works & Bldgs. v. Schon, (1969), 42 Ill. 2d 537, 541, 250 N.E. 2d 135:

"***The Supreme Court of the United States pointed out many years ago, 'It is settled by the decisions of this court that just compensation is the value of the property taken at the time of the taking.*** (citing cases)*** And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306, 67 L. Ed. 664, 669, 43 Sup. Ct. Rep. 354; United States v. Benedict, 261 U.S. 294, 298, 67 L. Ed. 662, 664, 43 Sup. Ct. Rept. 357; United States v. Brown, decided November 12, 1923, 263 U.S. 78, ante. 171, 44 Sup. Ct. Rep. 92.' Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123, 68 L. Ed. 934, 941; see also 41 Ill. L. Rev. 82, 104.***"

Since petitioner mistakenly pursued his legal remedy for "taking", he should not now be foreclosed by the doctrine of election of remedies from proceeding against trespassers for damage to his adjudicated possession.

All Persons Who Jointly Trespass During The Period Of A Landowner's Possession Are Equally Liable. They May Be Sued Jointly And Severally And Recovery May Be Against Either Or All

The Illinois Appellate Court, First District, also failed to equate the legal effect of the status of these respondents in trespassing. All of the respondents named in the trespass and conspiracy action are alleged to be joint wrongdoers who participated in the de facto and extra-judicial public dedication. Thereafter, for two and one half years, they continued to portray plaintiff's private property as public, trespassed thereon and invited members of the public to trespass. None of these defendants were or could be parties to either the mandamus or eminent domain proceedings and they were not named as parties in

those proceedings. 55 C.J.S., Mandamus, Sec. 1, page 15; People ex rel. Carey v. Cousins, (1979), 77 Ill. 2d 531; 397 N.E. 2d 809, cert. den. 100 S. Ct. 1603, 63 L. Ed. 2d 788 445 US. 953; Sanitary District v. Johnson, (1931), 343 Ill. 11, 174 N.E. 862, Chicago Housing Authority v. Lamar, (1961), 21 Ill. 2d 362,172 N.E. 2d 790.

The fact that these defendants participated with the state in the de facto, extra-judicial dedication of petitioner's private property to public use does not exculpate these defendants but makes them joint wrongdoers with the state. All those who actually trespass, as well as all those who induce, direct or request the commission of a trespass or who aid or abet a trespasser in committing a trespass, become joint tortfeasors or joint trespassers. 87 C.J.S., Trespass, Sec. 2, Page 957. See also Dial

v. City of O'Fallon, (1980), 81 Ill. 2d 548, 411 N.E. 2d 217, where the court said at pages (81 Ill. 2d 556-557):

> "***As indicated above one can be liable under present-day trespass for causing a thing or a third person to enter the land of another either through a negligent act or an intentional act."

The rule is that all who wrongfully contribute to the commission of a trespass are equally liable. They may be sued jointly or severally and recovery may be against either or all. 87 C.J.S., Trespass, Sec. 32, Page 990. Miller v. Simon, (1968), 100 Ill. App. 2d, 6, 9, 241 N.E. 2d 697.

Improper Actions And Wrongful Acts Are Not Shielded Because One Trespasser Has The Power Of Eminent Domain. These Defendants Did Not Seek Eminent Domain But Simply Declared Petitioner's Private Property To Be Public And Trespassed Thereon

While the power of eminent domain is a good defense to a taking in accordance

with the power and right, such power must be strictly exercised in accordance with the statutory and constitutional requirements. The right of eminent domain is not a defense to wrongful trespass during the eminent domain proceeding nor to extra-judicial de facto dedications of private property to public use made by persons or entities, irrespective of whether such persons have or have not the power of eminent domain. 87 C.J.S., Trespass, Sec. 52-B, Page 1006. There are no exceptions to the rule. See Kaiser Aetna v. United States, (1979), 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (as to the United States); Webb's Fabulous Pharmacies, Inc. v. Beckwith, (1980), 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446 as to state action (at 449 U.S. 164):

> "***a state, by ipse dixit, may not transform private property into public property without compensation***."

It includes cities and other local governmental entities. Chicago, B. & Q.R. Co. v. Chicago, (1897), 166 U.S. 226 41 L. Ed. 979; San Diego Gas & Electric Co. v. San Diego, (1981), 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287 ; Devines v. Maier (CA 7th, 1981), 665 F. 2d 138 and governmental officials not acting in good faith (the "good faith" defense will not exculpate the local government entity). Owen v. City of Independence, (1980), 445 U.S. 662, 63 L. Ed. 2d 673, 100 S. Ct. 1398; Hernandez v. City of Lafayette, (CA 5th, 1981), 643 F. 2d 1188.

It applies as well to commissions of government. Lake Country Estates v. Tahoe Planning Agcy., (1979), 440 U.S. 391, 59 L. Ed. 2d 401, 99 S. Ct. 1171.

It applies to not-for-profit associations, American Soc. of M.E.'s v. Hydrolevel Corp., (1982), 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935, 50 LW 4512, and to all other persons. See Mt. Carmel Utility Co. v. Public Utilities Comm'n., (1921), 297 Ill. 303, 309, 130 N.E. 693; North Ill. Traction Co. v. Commerce Comm., (1922), 302 Ill. 11, 134 N.E. 142, where the court said at 302 Ill. 23:

> "***In the case of Mt. Carmel Utility Co. v. Public Utilities Comm., 297 Ill. 303, this court held that the State has no power to compel a public utility to serve the public without reasonable compensation, as legislation, in whatever form, by which the property of one is applied to the use of another or to the public without compensation is forbidden by Section 2 of the bill of rights in our constitution and by the Fourteenth Amendment to the Federal Constitution.***"

All of these respondents are either governmental entities, public officials or members of a not-for-profit corporation acting as a Management Committee and

selected for their experience. If anyone should be aware of the laws of condemnation and trespass, they should.

The Plaintiff Has Not Received Double Compensation, Nor Was Double Compensation Threatened By the Instant Suit

The Illinois Appellate Court, Third District, in Department of Conservation v. Lawless, (1981), 100 Ill. App. 3d 74 (Appendix C) stated that petitioner was in possession during the period of alleged trespass, that possession was not taken by the state and denied petitioner's claim for pre-judgment interest (the traditional element of damage for the "taking" of possession prior to condemnation.

It is clear from that decision that petitioner sustained no recovery in the compensation award for the "taking" of or damage to his adjudicated possession.

Findings by the First District Illinois Appellate Court that petitioner's possessory rights, during the period of trespass by these respondents, were compensated for by the state and that petitioner received "just compensation" as required by the Constitution (Appendix A, Opinion Page 753) are contrary to and in clear conflict with the findings of the Third District Appellate Court. Where no compensation has been paid, the threat of double compensation does not exist.

For the foregoing reasons the doctrine of election of remedies does not apply. The rule in Grunewald has no application because 1) petitioner had adjudicated possession at the time of trespass by these defendants; 2) petitioner's mistaken belief that the state

had taken possession, when rejected by the Third District Illinois Appellate Court, did not destroy his alternate rights; 3) these respondents were joint wrongdoers with joint and several liability; 4) an action for trespass against one's exclusive possession is a consistent and not inconsistent remedy; 5) the eminent domain proceeding could not shield these respondents from the consequences of their wrongful acts; and 6) the petitioner has not received double compensation nor has double compensation been threatened.

The doctrine of election of remedies, a doctrine of limited application, has never been applied by any other court to bar consistent causes of action against separate defendants where no satisfaction has been received.

Fleming v. Dillon, (1938), 370 Ill. 325, 331, 18 N.E. 2d 910; Faber, Coe & Gregg v. First National Bank, (First Dist. 1969), 107 Ill. App. 2d 204, 211, 246 N. E. 2d 96.

IV. ONE APPELLATE COURT OF THE STATE MAY NOT RULE THAT CONSTITUTIONAL DAMAGES FOR TRESPASS ARE INCLUDED WITHIN A CONDEMNATION AWARD WHEN ANOTHER STATE APPELLATE COURT, ON THE SAME FACTS, HAS SPECIFICALLY HELD TO THE CONTRARY. (THE SUPREME COURT OF ILLINOIS HAVING DENIED APPEAL IN BOTH CASES).

Rule 17.1(b) of this court, pertaining to review on certiorari provides:

> "1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> ***
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort***"

It is respectfully submitted that atypical rulings of the courts below bring this case within the purview of this section, as well as Rule 17.1(c) which provides for review:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

The decisions of the Illinois Appellate Courts of the Third and First Districts are both final judgments of "the highest court of a State in which a decision could be had" (the Illinois Supreme Court having denied appeal in both cases). Title 28 U.S.C., Section 1257.

Both decisions rest on the same facts. They make opposite rulings on the issues of possession and compensation.

The Third District Illinois Appellate Court held that petitioner had possession during the condemnation proceedings and was not entitled to the pre-judgment interest as compensation for the loss of that possession. The First District Illinois Appellate Court (the Court below) on the same facts (it reviewed those facts and the prior opinion) held that while petitioner had possession he had received payment in the award and satisfaction for the loss of his possessory rights.

It is seldom that two highest courts of the same state will make express and contrary rulings on the same facts, as here. When it does occur and the result is to destroy a constitutional right, this court's supervision is warranted.

The Third District Appellate Court described petitioner's argument for pre-judgment interest as "appealing in a very technical sense". Department of Conservation v. Lawless (Appendix C, Page 79). The First District Appellate Court described petitioner's arguments as "intriguing theory". Lawless v. Pierce (Appendix A, Page 754). But more than "technical" arguments and "intriguing theory" are here involved. At issue are rights guaranteed by the United States and Illinois Constitutions involving two and one half years of adjudicated possessory rights.

Final judgments put an end to all further controversy concerning the points in issue and those matters which may be reasonably inferred. This rule pertains

under various names, including res judicata, estoppel by verdict or, as here, estoppel by judgment. It is a cornerstone of American and English jurisprudence. See Hopkins v. Lee, (1821), 6 Wheaton 108, 5 L. Ed. 218, where this Court said at pages (6 Wheaton 113-114):

> "It is not denied, as a general rule, that a fact which has been directly tried, and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this, there is and ought to be, no difference between a verdict and a judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never

> be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. It applies to sentences of courts of admiralty--to ecclesiastical tribunals--and, in short, to every court which has proper cognizance of the subject matter, so far as they profess to decide the particular matter in dispute."

The First District Appellate Court legally could not and should not have made its findings of payment and satisfaction when a prior express final ruling of a court of coordinate jurisdiction, on the same facts, was to the contrary.

More than one individual's rights are involved. Unless reversed, the decision of the lower court sets the stage for expropriation of private property to public use by the simple process of dedication to public use through ordinance,

resolution or dedication ceremony, as was here done.

V. THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE PAYMENT OF "JUST COMPENSATION" WHEN PRIVATE PROPERTY IS DECLARED TO BE PUBLIC BY ORDINANCE, RESOLUTION OR DEDICATION CEREMONY.

This court in San Diego Gas & Electric Co. v. San Diego, (1981), 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287 was asked:

> "*** to rule that a State must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment. This question was left open last Term in Agins v. City of Tiburon, 447 US 255, 263, 65 L. Ed. 2d 106, 100 S. Ct. (1980). Because we conclude that we lack jurisdiction in this case, we again must leave the issue undecided." (450 U.S. at 623).

These respondents are villages, a forest preserve district, a not-for-profit

association and individual representatives of public entities. The State of Illinois is not a defendant. Under Illinois law it must be (and has been) sued in the Illinois Court of Claims and that litigation remains in repose until all other litigation is terminated. (Appendix D).

In San Diego the majority of the court held that the lower court's decision was not final since there was no decision on the question of "taking". That situation does not exist here. The decision of the lower court is final on all issues and the federal questions implicit in both San Diego and Agins are squarely presented in this appeal. It makes no difference whether private property is declared public by ordinance, resolution or public dedication ceremony. The result is the same to the landowner involved.

This court in Penn Central Transp. Co. v. New York City, (1978), 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 considered whether restrictions imposed by a landmark preservation law constituted a Fifth Amendment "taking". It identified "economic impact" and the "character of the governmental action" as particularly relevant considerations (438 U.S. 124). It found no Fifth Amendment "taking" because the restrictions were substantially related to the general welfare and did not restrict reasonable beneficial use of the site nor detract from the site. But in Goldblatt v. Town of Hempstead, (1962), 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987, this court warned:

> "***That is not to say, however, that governmental action in the form of

> regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." (369 U.S. 594).

Here the respondents, public entities and public officials, chose to short circuit the entire eminent domain process through a de facto public dedication ceremony. (Whether the dedication ceremony was approved by the public entities through ordinance or resolution is a question of fact at trial). Petitioner's property was not restricted -- it was declared to be public property and thereafter used as such for two and one half years.

The compensation award to petitioner covers all aspects of the taking except his possessory rights for two and one half years. They are not unimportant. Loretto v. Teleprompter Manhattan CATV

Corp., (1982), 458 U.S. 419, 73 L. Ed. 2d 868, 882 102 S. Ct. 3164.

Possessory rights during condemnation have been clearly defined under Illinois law. In City of Crystal Lake v. LaSalle Nat'l. Bk., (1984), 121 Ill. App. 3d 346, ____ N.E. 2d ____, the court summarized that law, stating at page 350:

> "The condemning body, absent statutory quick-take provisions, does not have the right to take possession until the ascertainment and payment of just compensation. (Ill. Rev. Stat. 1981 ch. 110, par. 7-123; South Park Commissioners v. Dunlevy (1878), 91 Ill. 49, 54)***".

Upon payment of the compensation award title relates back but possession never does. This case did not involve quick-take. The court in Crystal Lake said further at page 356:

> ***"The statutory restriction against a condemning authority's entitlement to possession until it

> pays the compensation awarded is for the protection of the landowner. (Ill. Rev. Stat. 1981, ch. 110, par. 7-123(a); Department of Public Works & Buildings v. Butler Co., (1958), 13 Ill. 2d 537, 545; People ex rel Hesterman v. Smart, (1928), 333 Ill. 135, 137)***".

The Illinois rule and the constitutional guarantees are for the protection of the landowner. In this case the state was not entitled to possession until it paid the award two and one half years after the de facto public dedication ceremony. The respondents here, trespassers, could not rely on state action since the state had no rights to possession.

Petitioner's exclusive possessory rights, during the condemnation period, are an integral part of the "bundle of rights" given to public use by these respondents. The Fifth and Fourteenth Amendments require the payment of

compensation when they were damaged to public use by those respondents.

It is respectfully submitted that this case clearly raises those issues left open in San Diego and Agins; and that the questions presented warrant this Court's consideration if the right of eminent domain, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 15, of the Illinois Constitution of 1970, is to be preserved.

CONCLUSION

This Petition for Certiorari represents what may be the last act in this litigation which has consumed eight years and seven appeals. This entire litigation stems from acts of public authorities and their representatives which can be only described as gross. The events portrayed by this appeal, and as described by the courts below, could occur only because the respondents and State representatives totally and blatantly ignored the Federal and State Constitutions, basic law of property and their public trust.

Because of their actions, the petitioner, a landowner whose property was desired for public use, has been deprived of rights guaranteed to him by the Federal and State Constitutions. The law of

eminent domain afords to the public entity and the private property owner a well-established means for adjusting their differences in accordance with sound constitutional principles established over the centuries. That law is clear and has, in the main, been consistently applied by the courts of the land so as to protect the right of private property from encroachment or invasion by the public.

What is at issue here is not the law of eminent domain, but whether or not public entities and their representatives can act with callous and reckless indifference to those laws. If, as the court below holds, a landowner may not defend against extra-judicial invasion by mandamus unless he forgoes his trespass

action, the stage is set for the taking of private property to public use by a simple public dedication process.

It makes no difference whether the public authority converts private property to public use or destroys possessory rights to that property by ordinance, resolution or public dedication. If that can be done, then the constitutional guarantees have no meaning for they can be subverted at will by the public authority.

That is the issue here. This petitioner, an attorney, has been able to progress this litigation and these appeals. The average landowner is not so equipped. The danger of the decision below is that it affords to the public authority a means whereby the entire eminent domain process can be circumvented or subverted, leaving the

landowner without any remedy at all. This court has consistently held that the State may not engraft public uses on private property, nor for that matter, by "ipse dixit" make private property public. These defendants, public entities, should not be allowed to do what the State cannot.

For the foregoing reasons it is respectfully suggested that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First Judicial District.

Respectfully Submitted,

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Petitioner

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APPENDIX

APPENDIX A

OPINION OF THE ILLINOIS APPELLATE COURT, FIRST DISTRICT
(The Court Below)
(Reported At 118 Ill. App. 3d 747)
(Opinion Pages Are Inserted In The Body Of The Text Of The Opinion)

LAWRENCE LAWLESS, *Plaintiff-Appellant*, v. ROBERT PIERCE, MARY LOU MARZUKI, ARLENE KAGANOVE, EUGENE SCHWARTZ, FRED HENIZE, TIM WARREN, CHARLES NOTARUS, JOE MEREDITH, JON MENDELSON, THORN CREEK PRESERVATION ASSOCIATION, VILLAGE OF PARK FOREST, VILLAGE OF PARK FOREST SOUTH, FOREST PRESERVE DISTRICT OF WILL COUNTY, AND OTHERS WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF, *Defendants-Appellees.*

(Opinion Pages 747-748)

LAWRENCE LAWLESS, Plaintiff-Appellant. *v.* ROBERT PIERCE *et al., Defendants-Appellees.*

First District (2nd Division) No. 82—1911
Judgment affirmed.

Opinion filed September 6, 1983.—Modified on denial of rehearing November 1, 1983.

1. FORMER ADJUDICATION (§78)—*condemnee's action alleging tortious trespass was barred as attempt to recover for same acts for which condemnee had been compensated by condemnation award.* Where court in condemnation proceedings found that "taking" occurred some 2½ years earlier and awarded compensation based on valuation as of such earlier date when **(p. 748)** condemnor entered onto land and became vested with title even though condemnee remained in possession, condemnee's subsequent action alleging condemnor's tortious trespass between earlier date and subsequent condemnation proceedings was barred as attempt to recover from same acts for which condemnee had been compensated by condemnation award.

2. EMINENT DOMAIN (§325)—*mandamus complaint to compel commencement of condemnation proceedings amounted to election of remedies barring plaintiff from maintaining subsequent action for trespass. Mandamus* complaint to compel commencement of condemnation proceedings on property on which public authorities were committing alleged unlawful trespass, resulting in condemnation award which included valuation of property as of taking commencing on date of initial trespass, amounted to election of remedies barring plaintiff from maintaining subsequent action to recover additional compensation upon joining different defendants and asserting trespass to property for which he had been compensated and by operation of law no longer held title thereto (Ill. Const. 1970, art. I, sec. 15).

3. TRESPASS (§2)—*action for trespass can be based solely on possession without legal title since gist of action is injury to possession.*

4. EMINENT DOMAIN (§325)—*plaintiff's alleged right to bring action for trespass to same property for which he had previously received condemnation award rejected by reviewing court.* The plaintiff's theory in his petition for rehearing that he was entitled to bring an action for tortious trespass to land for which he had previously received a condemnation award was rejected by the reviewing court, notwithstanding plaintiff's claim that the condemnation award contained a finding that he continued to have possession of the property between the date of dedication of the property to a State use and the condemnation verdict as the damage to the possessory interest was included in the compensation award and the plaintiff was barred by the doctrine of election of remedies from bringing a *mandamus* action for the trespass damages or prejudgment interest.

Appeal from the Circuit Court of Cook County; the Hon. Myron T. Gomberg, Judge, presiding.

Lawrence Lawless, of Chicago, for appellant, *pro se.*

Kenneth G. Kombrink, of Dunn, Goebel, Ulbrich, Morel & Hundman, of Bloomington, for appellee Jon Mendelson.

Jay S. Judge, Kristine A. Karlin, and Gregory G. Lawton, all of Judge & Knight, Ltd., of Park Ridge, for other appellees. (p. 749)

PRESIDING JUSTICE DOWNING delivered the opinion of the court:

Plaintiff, Lawrence Lawless, brought this action against defendants Pierce, Notarus, Meredith and Henize—individually and as agents of defendants villages of Park Forest and Park Forest South—defendants Kaganove, Marzuki and Schwartz—individually and as agents for the not-for-

profit corporation defendant Thorn Creek Preservation Association—and defendants Mendelson and Warren—individually and as agents for Governors State University and Illinois Department of Conservation. The facts, as well as a history of the previous litigation in this case, will be briefly summarized.

The property which is the subject of this lawsuit is a four-acre tract of land situated in an unincorporated area between the villages of Park Forest and Park Forest South in Will County. In 1962, plaintiff became owner of the land which was improved with a residence, garages and out buildings, and contained a one-acre pond. In 1969, the Thorn Creek Preservation Association (the Association) was chartered to seek acquisition of Thorn Creek Woods, a 800-acre tract of wooded land to which plaintiff's land abutted. A "Joint Management Committee for Thorn Creek Woods" was established and the Association, Governors State University and the individuals named in this lawsuit were appointed to it.

In 1972, the Illinois Department of Conservation notified plaintiff that it intended to purchase his property as part of an overall plan to develop Thorn Creek Woods Nature Preserve. Between January 1976 and March 1978, unsuccessful negotiations took place between plaintiff and the Department and, on January 31, 1978, the Department notified plaintiff of its intent to take his property by eminent domain. Those proceedings were not initiated at that time, however.

Plaintiff's amended complaint alleges that on June 4, 1978, defendants, jointly and severally, sponsored, advertised and invited approximately 1,000 members of the public to a public dedication ceremony of the area, including plaintiff's private property, as a nature preserve. Plaintiff alleges that his property was portrayed as public, his residence as an interpretative center, his private land as public

picnic grounds and parking areas, and that public nature walks were displayed throughout his property.

On June 27, 1978, plaintiff sought a writ of *mandamus* against the Department to compel condemnation of his property. A default judgment was granted against the Department on August 9, 1978. An eminent domain proceeding was initiated when the Department filed a petition to condemn on July 28, 1978. Plaintiff was awarded the sum (p. 750) of $180,000 by a jury in the condemnation action as compensation for the taking of his property from the date of the "taking" (which was the date of dedication), June 4, 1978. Thereupon, the Department appealed from the *mandamus* judgment, and plaintiff appealed from the trial court's denial of his plea for certain fees and costs. The third district of this court, in *Department of Conservation v. Lawless* (1981), 100 Ill. App. 3d 74, 426 N.E.2d 545, *appeal denied* (1982), 88 Ill. 2d 550, affirmed the judgment in the *mandamus* action and vacated the eminent domain judgment as to the amount of judgment. The cause was remanded to reconsider the question of reasonable attorney fees and other costs.

In the present action,[1] plaintiff filed a four-count amended complaint which alleged that: from June 4, 1978, the date of the public dedication, until January 28, 1981, the date the State paid the compensation award, defendants portrayed and represented his property to be public, and induced and invited members of the public to commit acts of trespass; defendants' actions were wilful thereby warranting punitive damages; defendants violated the Illinois Antitrust Act (Ill. Rev. Stat. 1979, ch. 38, par. 60—3(2)); and defendants committed common law conspiracy.

[1] This court, in July 1982, decided that Cook County was the proper forum in the instant action. 108 Ill. App. 3d 191, 438 N.E.2d 1299.

Defendants filed motions to dismiss plaintiff's complaint. (Ill. Rev. Stat. 1979, ch. 110, pars. 45, 48.) The trial court granted this motion, ruling that plaintiff's causes of action were barred by the doctrine of election of remedies, and that plaintiff's cause of action for conspiracy in violation of the antitrust statute could not be sustained because no restraint of trade was shown. Plaintiff now appeals from the order entered by the court dismissing his complaint.

I

Plaintiff strongly urges that the trial court's dismissal of his complaint be reversed in order that he receive compensation for the taking of his property as guaranteed by the United States and Illinois constitutions. (U.S. Const., amend. V; Ill. Const. 1970, art. I, sec. 15.) Plaintiff acknowledges that although he has already taken proper action against the Department of Conservation, which is not a defendant here, the only recourse available to him against the instant defendants is an action in trespass for damages.

The third district of this court held that the date of "taking" of plaintiff's property was June 4, 1978, the date of the public dedica (p. 751) tion.[2] In addition, it was judicially established that plaintiff retained actual possession of the property between June 4, 1978, and the date of the condemnation verdict of June 26, 1980. (*Department of Conservation v. Lawless* (1981),100 Ill. App. 3d 74, 79.) The court also affirmed the Will County trial court's denial of plaintiff's claim for statutory interest from June 4, 1978, the date of "taking," together with mortgage interest plaintiff owed on the subject property from June 4, 1978, to June 26, 1980. In the present action, plaintiff theorizes that

[2] Plaintiff, in his briefs in the third district, did not disagree with the action of the trial court in the *mandamus* action of establishing June 4, 1978, as the date of "taking."

because he retained exclusive possession of the property from June 4, 1978, until the date the condemnation award was paid, he should be compensated for the wrongful acts of entry upon his land during this period.

• 1 Plaintiff argues that, contrary to the trial court's ruling in the instant case, his action is not barred under the doctrine of election of remedies. In accordance with that principle, when a party pursues one remedy which is inconsistent with other possible remedies to the extent that to follow one is to renounce the other, the satisfaction of the chosen remedy acts as a bar to the others. *Casati v. Aero Marine Management Co.* (1980), 90 Ill. App. 3d 530, 536-37, 413 N.E.2d 122.

Plaintiff contends that the doctrine of election of remedies does not bar an action for trespass which antedates condemnation. The case upon which plaintiff heavily relies for support is *Wehrum v. Village of Lincolnwood* (1968), 91 Ill. App. 2d 418, 235 N.E.2d 343, *appeal denied* (1968), 38 Ill. 2d 630. In that case, the local municipality had converted plaintiffs' private property into a playground in 1960, but the condemnation proceedings were not instituted until 1965. As a result of those proceedings, plaintiffs received an award which determined the value of their property as of 1965. Wehrum sought damages for the condemnor's tortious acts of trespass upon the land for the period between 1960 and 1965. The appellate court concluded that as the only issue litigated in the condemnation action was the value of the land as of the date the petition to condemn was filed (1965), plaintiffs' action for damages, which were incurred prior to this date, was not barred by the doctrine of *res judicata*. See *Wehrum v. Village of Lincolnwood* (1968), 91 Ill. App. 2d 418, 420-21, 235 N.E.2d 343.

A review of eminent domain law in Illinois reveals that traditionally, and as provided for statutorily, the date of valuation in a condemnation suit is the date of the filing of

the petition to condemn. (Ill. (p. 752) Rev. Stat. 1979, ch. 47, par. 9.7; *Trustees of Schools v. First National Bank* (1971), 49 Ill. 2d 408, 411, 274 N.E.2d 56.) It has been recognized, however, that this valuation date may work an injustice in a case where the property owner initiated inverse condemnation proceedings after a governmental entity had already taken the party's property. *Department of Transportation v. Shaw* (1976), 36 Ill. App. 3d 972, 982-83, 345 N.E.2d 153, *rev'd in part* (1977), 68 Ill. 2d 342, 351, 369 N.E.2d 884, where the supreme court held that where there was no actual taking of land, and where the damage suffered resulted solely from the elimination of direct access to the public road, the proper valuation date is the date of the physical closing of the road.

In *Wehrum*, the valuation date was the 1965 date of filing of the petition to condemn. There, the alleged tortious conduct commenced in 1960, prior to the valuation date. Here, the first instance of trespass alleged by plaintiff was on June 4, 1978, which is the same date used by the court in the condemnation action as the "taking" date. Therefore, the damages which plaintiff allegedly sustained for the acts of trespass were included in the compensation award, unlike the situation in *Wehrum*.

It must also be noted that plaintiff acknowledges in his reply brief that once payment of a compensation award is made by the State, its title relates back to the date of taking. Thus, plaintiff concludes that on January 28, 1981, the date the State paid the award, title related back to June 4, 1978. However, since the State's title vested as of June 4, 1978, plaintiff's attempt to recover for the alleged tortious acts of defendants from that date must fail; they are the very acts which constituted the "taking" for which plaintiff has already received compensation.

A case which is distinguished in *Wehrum*, and upon which the trial court and defendants relied, is *Grunewald v. City of Chicago* (1939), 371 Ill. 528, 21 N.E.2d 739. In that case,

the supreme court held that it did not have jurisdiction to hear the case since it was in the nature of a common law action for damages, and not under the purview of the eminent domain statute. The language applicable to the case at hand is:

> "Appellees had a right to sue at law for damage to their property or to proceed in *mandamus* to compel the proper officers to bring proceedings under the Eminent Domain act. [Citation.] They had a right to elect the remedy they thought best suited to the end sought, and satisfaction of the claim in one of the modes of recovery constitutes a bar to the other. [Citation.]" *Grunewald v. City of Chicago* (1939), 371 Ill. 528, 532, (p. 753) 21 N.E.2d 739.

We note that in a recent supreme court case involving the issue of whether a property owner could compel a municipality, by way of a writ of *mandamus*, to institute eminent domain proceedings, the court commented on the *Grunewald* case. The court stated that since *Grunewald* involved a common law action for damages, any reference to a *mandamus* remedy against a municipality was purely dicta and, as applied to municipalities, was wrong. (*Granite City Moose Lodge No. 272 v. Kramer* (1983), 96 Ill. 2d 265, 272, 449 N.E.2d 852). This comment does not, however, affect our reliance upon *Grunewald* for its authority regarding the election of remedies doctrine.

• 2, 3 In this case, plaintiff had two options available to him when he was faced with the situation of the alleged unlawful trespass to his land. He could have sued at common law for damages, or proceeded in *mandamus* to compel eminent domain proceedings. (*Grunewald v. City of Chicago* (1939), 371 Ill. 528, 532.) He chose the latter remedy resulting in a condemnation award which included a valuation of his property as of the date of "taking," i.e., the same date which he claims the trespasses began. The

trial court was thus correct in ruling that plaintiff was barred from bringing this cause of action upon the doctrine of election of remedies.

Plaintiff, having received "just compensation" as required by the fifth amendment to the United States Constitution and article I, section 15 of the Illinois Constitution of 1970 for the taking of his property on June 4, 1978, is not entitled to recover additional compensation by joining different defendants, and by bringing the action under the theory of trespass to property for which, by operation of law, he did not hold title. We do not mean to infer, of course, that a cause of action for trespass cannot be based solely upon possession without legal title, since our courts have recognized that the gist of the action is injury to possession. *Krejci v. Capriotti* (1973), 16 Ill. App. 3d 245, 247, 305 N.E.2d 667, *appeal denied* (1974), 55 Ill. 2d 605; see also *Advance Elevator & Warehouse Co. v. Eddy* (1887), 23 Ill. App. 352, 355; 34 Ill. L. & Prac. *Trespass* sec. 5 (1958).

• 4 In his petition for rehearing filed before this court, plaintiff argues that our present decision denying him the relief of damages for trespass and the third district's decision of September 3, 1981, are now in conflict. He notes that the third district did not grant him prejudgment interest because it found that he continued to have actual, physical possession of the property between the date of the dedication and the date of the condemnation verdict. (*Department of Conservation v. Lawless* (1981), 100 Ill. App. 3d 74, 79.) Plaintiff goes on to (p. 754) argue that our decision denying him damages for trespass during this period is inconsistent because we held that the damages to his possessory interest was included in the compensation award. Plaintiff claims that we arrived at this decision because we inadvertently assumed that the taking of title by the State which related back to the date of the dedication

included the taking of possession. This conclusion would be contrary to the third district's holding that he retained possession, if indeed that had been our reasoning. Plaintiff, however, misreads our decision. We concluded that plaintiff, by pursing (*sic*) the *mandamus* action, was now barred from bringing this action for damages because of the doctrine of election of remedies. In his petition for rehearing, plaintiff urges that in addition to the eminent domain award, he is entitled to either prejudgment interest, which was denied by the third district, or damages for an alleged trespass. We find no authority to support plaintiff's intriguing theory that he is entitled to compensation twice under the reasoning he advances.

II

Plaintiff's actions for the alleged antitrust violations (Ill. Rev. Stat. 1979, ch. 38, par. 60—1 *et seq.*) and conspiracy to commit trespass to land must fall for the reasons set forth above.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

STAMOS and PERLIN, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

January 31, 1984

Mr. Lawrence Lawless
Attorney at Law
One Illinois Center
111 E. Wacker Dr., S#2700
Chicago, IL 60601

No. 59386 - Lawrence Lawless, petitioner, vs. Robert Pierce, et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on February 22, 1984.

APPENDIX C

OPINION IN
DEPARTMENT OF CONSERVATION *v.* LAWLESS,
100 Ill. App. 3d 74 (1981)
(Opinion Pages Are Inserted In The Body Of The Text Of The Opinion)

(Opinion Page 74)

THE DEPARTMENT OF CONSERVATION, Plaintiff-Appellee and Cross-Appellant *v.* LAWRENCE LAWLESS, Defendant-Appellant and Cross-Appellee.—LAWRENCE LAWLESS, Plaintiff-Appellee, *v.* DAVID KENNEY, Director of Conservation, Illinois Department of Conservation, Defendant-Appellant.

Third District Nos. 80-573, 80-477 cons.

Affirmed in part, and reversed in part and remanded.

Opinion filed September 3, 1981.—Rehearing denied October 14, 1981.

1. MANDAMUS (§7.5)—*default mandamus order compelling Department of Conservation to proceed by condemnation was neither useless nor moot.* Default *mandamus* order compelling Department of Conservation to proceed by condemnation to purchase property intended by Department to become part of nature preserve was neither useless nor moot despite fact it was entered 12 days after Department filed eminent domain action, where Department was personally served three days after owner of property requested *mandamus*, but, instead of responding to complaint, Department did nothing until day after order was entered when it sought to vacate default order, and where owner was not personally served with process in eminent domain action until after *mandamus* order was entered.

2. MANDAMUS (§88)—*contention that property owner concealed facts relevant to action was not supported by record.* Record did not support Department of Conservation's contention that property owner lied or concealed facts relevant to issuing writ of *mandamus* when, in applying for *mandamus*, he stated that Department had not filed eminent domain suit, had threatened condemnation, and had invited general public to his home where owner was not personally served with process in eminent domain action until nine

days after default order of *mandamus* was issued and where it was undisputed that prior to request for *mandamus* Department held public dedication ceremony on edge of nature preserve opposite owner's property, representing property as being public land.

3. EMINENT DOMAIN (§330)—*fees and costs properly awarded in condemnation proceeding.* Award of attorney's fees and costs was proper in condemnation proceeding, where Department of Conservation was ordered to proceed by condemnation by issuance of writ of *mandamus* (Ill. Rev. Stat. 1979, ch. 47, par. 9.8).

4. JUDGMENTS (§142)—*when default judgment will not be set aside.* Although Illinois courts are liberal in setting aside default judgments, such result was not warranted where failure of Department of Conservation to appear in *mandamus* action was due to Department's own negligence, mistake, or calculated indifference.

5. EMINENT DOMAIN (§331.10)—*interest should not accumulate on condemnation award until actual possession takes place.* Although condemnation (p. 75) award generally earns interest from time judgment is entered until condemnor pays award to county treasurer, common sense dictates that interest should not accumulate until actual possession takes place.

6. EMINENT DOMAIN (§331.10)—*owner was not entitled to statutory interest until date of judgment in eminent domain proceeding.* Where owner retained actual, physical possession of condemned property up until time of verdict and judgment in eminent domain action, and where Department of Conservation did not obstruct his occupancy or continued use of such property, owner was not entitled to statutory interest for period of time from date of "taking" established in *mandamus* judgment to date of eminent domain judgment.

7. EMINENT DOMAIN (§331.10)—*judgment in mandamus action had no bearing on determination of when possession of condemned property was surrendered. Mandamus* judgment did not bar trial judge in eminent domain proceeding from determining when owner surrendered actual possession of condemned property, fact which was material and controlling consideration in rendering proper judgment on condemnation award, where *mandamus* court never determined such fact.

8. EMINENT DOMAIN (§331)—*owner was not entitled to recover mortgage interest prior to date of judgment in eminent domain action.* Property owner was not entitled to recover amount of mortgage interest he owed on condemned property from date of "taking" determined by trial court in *mandamus* proceeding to date of judgment in eminent domain action as part of just compensation to which he was entitled under State and Federal constitutions, since such award would allow owner to live on condemned premises for two-year period for nothing.

9. EMINENT DOMAIN (§391)—*when fees and costs of appeal may be awarded.* Although appeal costs including attorney's fees are not recoverable in absence of statutory authorization, since defendant in eminent domain action has both statutory and constitutional rights to appeal eminent domain judgment and since General Assembly is charged with knowledge of existence of such rights when enacting costs section of Eminent Domain Act, posture of condemnee in inverse condemnation action is irrelevant as long as appeal he prosecutes is not completely frivolous (Ill. Const. 1970, art. VI, §6; Ill. Rev. Stat. 1979, ch. 47, par. 12).

10. EMINENT DOMAIN (§330)—*trial court erred in failing to allow fees and costs of appeal as permitted by statute.* Trial court erred when it did not allow reasonable outside attorney's fees and other enumerated expenses permitted by statute concerning post-judgment proceedings in

eminent domain action, where property owner took adverse position to Department of Conservation from outset, where Department sought to overturn *mandamus* judgment which was legal catalyst for eminent domain litigation, and where Department's failure to respond to *mandamus* complaint was cause of its own appeal.

11. EMINENT DOMAIN (§330)—*trial court erred in denying pro se at* (p. 76) *torney's fees.* Trial court erred in denying *pro se* attorney's fees with respect to eminent domain proceeding, where record did not reflect that various factors such as time and labor required, customary fee for such legal work, amounts of such awards in similar cases, novelty of question presented, actual necessity of hiring additional counsel, and attorney's reputation and experience formed basis for trial court's denial of *pro se* award, since in determining whether *pro se* award is reasonable, fact that attorney appears *in propria persona,* in addition to hiring outside counsel, is not sole determinant in justifying award of attorney's fees.

APPEAL from the Circuit Court of Will County; the Hon. EDWIN B. GRABIEC and the Hon. MICHAEL H. LYONS, Judges, presiding.

Tyrone C. Fahner, Attorney General, of Springfield (Roy Frazier, Assistant Attorney General, and Thomas Feehan, Special Assistant Attorney General, of counsel), for appellant.

Raymond A. Feeley, of Kozlowski, Polito & Feeley, of Joliet, and Lawrence Lawless, *pro se* of Chicago, for appellee.

Mr. JUSTICE HEIPLE delivered the opinion of the court:

This consolidated appeal involves the Department of Conservation's (the Department) attempt to purchase the residence and surrounding four acres of Lawrence Lawless,

which is located in Will County. Two lawsuits resulted. In the first, Lawless as plaintiff, sought a writ of *mandamus* ordering the Department's director to purchase the property by condemnation. The writ issued. In the second cause, the plaintiff, the Department, brought an eminent domain action against the defendant, Lawless. Although defendant received a favorable verdict, he complains about the trial court's denial of certain post-trial motions. The facts follow.

In 1972 the Department told Lawless of its intent to purchase his property as part of an overall plan to develop Thorn Creek Woods Nature Preserve in Park Forest, Illinois. The Lawless property abuts this area. Between January 1976 and March 1978, negotiations resulted in several offers which Lawless rejected as inadequate. On January 31, 1978, the Department notified Lawless of its intent to take his property by eminent domain. On June 4, 1978, a public dedication ceremony was held for the Thorn Creek Woods Nature Preserve. The Department acted as sponsor. The general public was invited. Lawless' home was designated, and publicly represented, as the Preserve's "Interpretive Center." The land encircling his home was earmarked as public picnic and parking areas.

On June 27, 1978, Lawless sought a writ of *mandamus* to compel the Department to proceed by condemnation to purchase his property. In response to this complaint the Department did nothing. Although person (p. 77) ally served, it did not file an appearance nor an answer. On August 9, 1978, the plaintiff moved for a default judgment, which was granted. The order provided the Department to proceed by eminent domain in the Lawless purchase. Two years later, the Department sought to vacate this order. On October 1, 1980, such motion was denied. The Department now appeals.

The eminent domain proceeding was initiated by the Department filing a petition to condemn the Lawless real

estate on July 28, 1978. Lawless was personally served in such action on August 17, 1978, eight days after the execution of the *mandamus* order. After some confusion about the legal ramifications of the latter order and the filing of tome-like briefs and memoranda, trial was set for June 23, 1980. It lasted four days. The jury returned an award of $180,000 as compensation for the Lawless property. Judgment was entered thereon. Lawless then filed motions for statutory interest on the award, and mortgage interest accruing from June 4, 1978, appraisal fees, costs, and attorney's fees for *pro se* and outside counsel. It is from the trial court's decisions on these motions that he now prosecutes his appeal.

The mandamus *action*

The Department alleges the trial court erred in granting the writ of *mandamus*. It argues the trial court lacked jurisdiction to consider the writ because no controversy existed between the parties. Since the eminent domain action had already been filed, it urges, the *mandamus* order requiring it to perform an act already done is useless and moot. It also complains that Lawless either lied, or concealed a material fact, when, in applying for *mandamus*, he stated the Department had not filed an eminent domain suit, had threatened condemnation, and invited the general public to his home. Finally, it contests the award of attorney's fees and costs, since, it claims, the Department undertook condemnation proceedings voluntarily, not by order of court. We affirm.

If the trial court lacked subject matter jurisdiction the Department correctly observes that its orders are void, can be contested at any time, and have no binding effect. In arguing the trial court was so disposed, the Department ignores the facts, as well as its own inertia, as a party in such litigation.

• 1 Lawless requested *mandamus* on June 27, 1978. The Department was personally served three days later. Instead of responding to the complaint, the Department, inexplicably, did nothing until August 8, 1980, when it sought to vacate the trial court's default order of August 9, 1978. The fact the Department filed an eminent domain action on July 28, 1978, does not alter the *mandamus* writ ordering it to file such a suit, although the latter was entered subsequently. The record makes clear that Lawless (p. 78) was not personally served with process in the eminent domain action until August 17, 1978. If Lawless was unaware of that suit, how could he inform the *mandamus* court of its existence on August 9, 1978? Such is impossible. The law imposed no duty on Lawless to search the records of the Will County Courthouse endlessly to ascertain whether the Department had filed a lawsuit against him.

• 2 Similarly, the record does not support the Department's contention that Lawless lied or concealed facts relevant to issuing the writ of *mandamus*. It is undisputed that on June 4, 1978, the Department held a public dedication ceremony for the Thorn Creek Woods Preserve. The entire 900-acre area, including the Lawless property, was dedicated. It matters not one whit, as the Department argues, that such ceremony was held on the edge of the preserve opposite the Lawless real estate. The point is the Lawless property was represented as being public land. Although we agree that literally "thousands" of persons did not descend upon the Lawless dwelling, such hyperbole does not amount to misrepresentation.

• 3, 4 We hold the issuance of the writ of *mandamus* was a valid, legal act, binding the parties to those terms which it specifically encompassed. The Department was duty-bound to adhere to its provisions. And, since the Department was ordered to proceed by condemnation, the subsequent award of attorneys' fees and costs was proper. The statute so pro-

vides. (Ill. Rev. Stat. 1979, ch. 47, par. 9.8.) Obviously, if the Department had taken the time to answer the *mandamus* complaint by showing proof of filing the eminent domain action, the time, effort, and expense this litigation spawned might have been reduced, if not eliminated. It cannot now seek to validate its position by its prior inaction. Although we recognize that Illinois courts are liberal in setting aside default judgments (*Diacon v. Palos State Bank* (1976), 65 Ill. 2d 304, 310-11), such a result is not warranted where, as here, the failure to appear is due to the Department's own negligence, mistake, or calculated indifference. No abuse of discretion occurred in denying the Department's motion to vacate the final *mandamus* judgment, or in awarding attorney's fees.

The eminent domain suit

As appellant, defendant Lawless raises three issues for our review: (1) whether statutory interest of 6 percent accrues from June 4, 1978 to June 26, 1980, the date of the eminent domain judgment; (2) whether mortgage interest owed on the condemned property during the same period should be awarded; (3) whether *pro se* attorney fees at trial, as well as *pro se* and outside attorney fees, appraisal fees, and costs should be allowed after judgment is entered at the trial level. The latter error will be addressed separately.

(p. 79) We do not agree with Lawless' contention that statutory interest accrues from June 4, 1978, the date of "taking" established in the *mandamus* judgment. Although appealing is a very technical sense, several reasons exist why such a conclusion is wrong.

• 5 Generally, a condemnation award earns interest from the time the judgment is entered until the condemnor pays the award to the county treasurer. (*Morton Grove Park District v. American National Bank & Trust Co.* (1980), 78 Ill. 2d 353, 358.) Common sense dictates that interest should

not accumulate until actual possession takes place. Although defendant argues the *mandamus* court found a "taking" of the Lawless property on June 4, 1978, this does not necessarily mean that at such time the Department took possession of the property. In arguing it does, Lawless ignores reality. As the trial judge noted, Lawless continued to live on the condemned premises after June 4, 1978, until June 26, 1980, the day the jury returned its verdict. In short, he had actual occupancy of the property. After the initial dedication ceremony the record is barren of any affirmative actions the Department undertook to cause Lawless to give up possession of those premises.

• 6 In this regard, *Department of Public Works v. Exchange National Bank* (1975), 61 Ill. 2d 346, is instructive. In that case, a State agency filed a petition to condemn 4000 of approximately 23,000 square feet of a building used as a restaurant and a dwelling. The condemnee cross-petitioned, claiming the State must purchase the whole fee interest, since if it did not, the remainder of the property would be useless. The State took possession of the land on September 1, 1970. Public access to the building was eventually halted on August 1, 1971. In affirming the trial court, the supreme court found the latter date controlling as to the date of possession (and thus when interest should be computed), since the condemnees had the use and occupancy of the property until that time. Although a "quick-take" condemnation case, this opinion as to the issue of when statutory interest is to be computed is fully applicable to the case at bar. Lawless retained actual, physical possession of the condemned property up until the time of the verdict and judgment. The Department did not obstruct his occupancy or continued use of such property.

• 7 Next, the *mandamus* judgment did not bar the eminent domain court from considering when possession by the Department actually occurred. In the *mandamus* action the

trial judge never determined, as a matter of fact, when Lawless surrendered actual possession of the condemned property. Since never determined originally, the eminent domain court was required to consider it. This is so because the finding of the particular fact of actual occupancy by the Department was material to the outcome in both lawsuits. Upon such finding hinged the date from which statutory interest would accrue. Moreover, it is unclear from the *mandamus* proceeding whether the date of "taking" namely, June 4, 1978, was (p. 80) viewed by the *mandamus* judge as the date when Lawless was actually dispossessed, in fact, or merely the date to be used for valuation of the Lawless property for purposes of compensation. Accordingly, since uncertainty exists on this vital issue, the trial judge in the eminent domain proceeding was not precluded from determining this fact which was a material and controlling consideration in rendering a proper judgment on the condemnation award. *Lange* v. *Coca-Cola Bottling Co.* (1969), 44 Ill. 2d 73.

• 8 Lawless also seeks to recover the amount of mortgage interest he owes on the condemned property from June 4, 1978, to June 26, 1980. This amount, he claims, is an element of "just compensation" to which he is entitled under the Illinois and Federal constitutions. This argument is completely meritless. Does Mr. Lawless expect to live on the condemned premises for a two-year period for nothing? Such is the result, if we accept the argument he advances. As long as people pay for housing, either by mortgage or rental payments, Mr. Lawless can expect to do no less.

Fees and costs

The final issue is double-barrelled: (1) is Lawless entitled to outside attorney, appraisal, and engineering fees and costs in connection with post-trial and appellate proceedings in these lawsuits? (2) was the denial of *pro se* attor-

neys' fees to Lawless himself in this entire litigation error? While we respond to the former affirmatively, we are constrained to deny such expenses in the latter instance.

Because our decision must turn on an interpretation of section 9.8 of the Eminent Domain Act, we set it out in full:

> "Where the State of Illinois, a political subdivision of the State or a municipality is required by a court to initiate condemnation proceedings for the actual physical taking of real property, the court rendering judgment for the property owner and awarding just compensation for such taking *shall determine and award or allow to such property owner*, as part of such judgment or award, such further sums, as will in the opinion of the court, reimburse such property owner for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred by the property owner in such proceedings." (Emphasis added.) Ill. Rev. Stat. 1979, ch. 47, par. 9.8.

The statute is not a paradigm of legislative clarity. It says a trial court "shall • • •" make an award of attorneys' fees and other litigation expenses, while permitting a trial judge to allow or refuse such an award based on his sound discretion. Nonetheless, the trial judge's denial of (p. 81) Lawless' outside attorney, appraisal and engineering fees, as well as costs in all post-trial proceedings, was error.

It is well settled in Illinois that appeal costs, including attorneys' fees, are not recoverable in the absence of statutory authorization. (*House of Vision v. Hiyane* (1969), 42 Ill. 2d 45, 51-52.) Although the aforementioned statute expressly permits an award of attorneys' fees and other litigation expenses, at the trial level, the State argues, if the statute is strictly construed, it says nothing about such post-trial expenses, and therefore does not authorize them.

Contrary to the State's assertion, *Department of Public Works v. Lanter* (1958), 15 Ill. 2d 33, does not warrant denial of such expenses.

Lanter involved a condemnee's appeal after the State dismissed a petition to condemn Lanter's property. (See Ill. Rev. Stat. 1979, ch. 47, par. 10.) Attorneys' fees for appellate legal work were denied. Lanter's appeal was not considered an integral component of the original eminent domain action. This is because, in appealing, Lanter effectively took the "offensive" in the litigation and thereby assumed a posture contrary to his position on the original condemnation petition. Accordingly, without a specific legislative authorization. the supreme court would not allow attorneys' fees concerning the appeal.

• 9, 10 A defendant in an eminent domain action has both statutory (Ill. Rev. Stat. 1979, ch. 47, par. 12) and constitutional (Ill. Const. 1970, art. VI, § 6) rights to appeal an eminent domain judgment. The General Assembly is charged with knowledge of the existence of such rights when it enacted section 9.8 of the Eminent Domain Act. This statute specifically authorizes awarding reasonable litigation expenses in inverse condemnation suits. Unlike Lanter, Lawless has taken an adverse position to the Department from the outset. Therefore, if the constitutional right of appeal means anything, the posture of a condemnee in an inverse condemnation action is irrelevant as long as the appeal he prosecutes is not completely frivolous. In the instant appeal Lawless is not the only appellant. The Department seeks to overturn the *mandamus* judgment. Since the actions have been consolidated, even *Lanter* would authorize Lawless' post-trial costs and attorneys' fees in the appeal of the latter judgment. This is so because the *mandamus* judgment was the legal catalyst for the eminent domain litigation. Moreover, the Department's failure to respond to the *mandamus* complaint was the cause of its

own appeal. If it had answered in a timely fashion, no doubt an appeal of the *mandamus* judgment would not have been filed. Accordingly, the trial court erred when it did not allow reasonable outside attorneys' fees and the other enumerated expenses section 9.8 permits concerning post-judgment proceedings in this litigation.

(p. 82) Also, the trial court erred in denying *pro se* attorneys' fees with respect to the instant litigation. The statute says the trial judge shall determine the composition of those enumerated litigation expenses, and allow or refuse such expenses in the exercise of its sound discretion. This means reasonable expenses should be allowed, whereas unreasonable ones should not. In determining whether a *pro se* award is reasonable, the fact an attorney appears *in propria persona*, in addition to hiring outside counsel, is not the sole determinant in justifying an award of attorneys' fees. The trial judge apparently thought it was.

• 11 Various factors such as the time and labor required, the customary fee for such legal work, the amounts of such awards in similar cases, the novelty of the question presented, the actual necessity of hiring additional counsel, and the attorney's reputation and experience, form that matrix of factors which comprise the reasonableness of an attorney's fee. The record does not reflect these components formed the basis for the trial court's denial of a *pro se* award. The fact that Mr. Lawless performed legal work in his own behalf does not, in and of itself, denote that compensation for such work is either unreasonable or reasonable. The justification for an award must turn on analysis and balancing of all factors enumerated above.

Therefore, on remand the trial court shall determine all litigation expenses, including *pro se* attorneys' fees, as enumerated in section 9.8 of the Eminent Domain Act. Such calculation is to include trial, post-judgment, and appellate proceedings. Once the amounts are computed, the trial judge

must then determine whether such are reasonable or unreasonable and enter an award for such expenses accordingly.

For the reasons stated, the *mandamus* judgment of the Circuit Court of Will County is affirmed. The eminent domain judgment is accordingly vacated as to the amount of the judgment. This cause is remanded to the Will County Circuit Court for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part; cause remanded.

BARRY and STOUDER, JJ., concur.

Statement of Facts, with Record References, Presented to the Illinois Appellate Court, First District

Plaintiff appealed from a final order of the Circuit Court of Cook County which dismissed plaintiff's amended complaint and suit (R. C 623). Jury demand was filed (R. C 20).

Plaintiff filed his complaint in this cause on January 29, 1980 (R. C 2-19). The defendants Pierce, Notarus, Meredith and Henize were joined individually and as agents of the governmental defendants Village of Park Forest and Park Forest South. The defendants Kaganove, Marzuki and Schwartz were joined individually and as agents for the not-for-profit corporation defendant Thorn Creek Preservation Association. Defendants Mendelson and Warren were joined

individually and as agents for Governors State University and Illinois Department of Conservation (who were not named as defendants in the suit) (R. C 2-19, 511-520).

The defendants Kaganove, Marzuki, Schwartz and Thorn Creek Preservation Association moved to dismiss (R. C 28-30, 43-44, 45, 47, 188-193); the defendant Tim Warren, on special appearance, moved to quash service of summons, which was granted by the Court (R. C 118-122, 153). The defendant Mendelson, on special appearance, moved to dismiss (R. C 31-33, 228-232, 276-299, 401-457) and all remaining defendants moved to transfer venue from Cook to Will County (R. C 56-60, 61-67, 73-75). The lower court denied all motions for transfer of venue (R. C 154, 613-617).

The defendants Village of Park Forest and Forest Preserve District of Will County prosecuted an interlocutory appeal to this court on questions of venue and this court affirmed the order of the lower court denying change of venue (Lawless v. Pierce, et al., No. 81-2486, First Dist., 2nd Div., Opinion rendered July 27, 1982). Lawless v. Pierce, 108 Ill. App. 3d 191 (First Dist., 1982).

Substitution of attorneys was filed as to certain defendants and all defendants moved to dismiss the complaint (R. C 174, 200-227). The lower court, on November 3, 1981, dismissed the complaint with leave to amend (R. C 508). An amended complaint was filed (R. C 509-520). All defendants moved to dismiss the amended complaint (R. C 521-525, 526-529, 534-555).

Plaintiff, in his amended complaint, alleged causes of action for trespass to property (Count I), willful trespass to property (Count II), conspiracy and trespass in violation of the Illinois Antitrust Act (Count III), and conspiracy and trespass to private property at common law with an allegation of willful conduct (Count IV) (R. C 511-519).

The plaintiff, with reference to all counts of the complaint, alleged that on and prior to June 4, 1978, plaintiff was the owner of and in exclusive possession of a four acre tract of real property improved with a residence, garages and out buildings, containing a private one acre pond. The residence property of the plaintiff is located in an unincorporated area between the Village of Park Forest and Park

Forest South and within a wooded tract of land consisting of approximately 800 acres, said forested tract being known as Thorn Creek Woods (R. C 511). Plaintiff further alleged that the governmental entities entered into an agreement for the planning and development of Thorn Creek Woods; that Illinois Department of Conservation participated in the agreement although it did not execute same; that pursuant to the agreement, a joint Thorn Creek Woods Planning Committee was established to develop a plan for development of Thorn Creek Woods and that the agreement made no provision for acquisition of or management of Thorn Creek Woods by the committee.

The governmental entities thereafter appointed Thorn Creek Preservation Association and Governors State University to serve

as voting members of the joint Thorn Creek Woods Plan Committee and the individual defendants joined in this action were appointed to the committee by their principals, the governmental entities and corporations (R. C 511-512).

It is further alleged that the defendants changed the name of the committee to the Joint Management Committee (Commission) for Thorn Creek Woods (the "Management Committee") and proceeded to engage in management and acquisition activities (R. C 512).

Plaintiff alleged further that prior to June 4, 1978, all defendants knew that plaintiff was the owner and in exclusive possession of his residence property (commonly known as 24500 South Western Avenue) and that prior to June 4, 1978, the

defendants, acting as the Management Committee, jointly and severally sponsored, advertised and invited approximately 1,000 members of the public to a public dedication ceremony for the purpose of dedicating Thorn Creek Woods to the public as a nature preserve (R. C 511-513).

It is further alleged that on June 4, 1978, at the public dedication ceremony, the defendants jointly and severally portrayed and represented the private property of the plaintiff as public property, his residence as an "interpretative center", his private road and driveway as public bus and staff parking, his pond as a public picnic area and his back yard as public parking access and further displayed public nature walks throughout his private property (R. C

513). The defendants continued to so portray plaintiff's private property as public property from June 4, 1978 until January 28, 1981 (R. C 513).

It is further alleged that during said period, members of the public visited the nature preserve and observed the portrayal of plaintiff's private property as public property or had the opportunity to do so; that the defendants sponsored and continued nature walks for the public upon plaintiff's property and that the de facto dedication of plaintiff's property as public property was itself a trespass against the property of plaintiff (R. C 513).

On July 14, 1982, the lower court dismissed plaintiff's amended complaint and suit (R. C 623). The lower court held that plaintiff's causes of actions were barred

under the doctrine of election of remedies by virtue of the fact that plaintiff had filed and obtained a judgment in mandamus against Illinois Department of Conservation and has received satisfaction of an eminent domain award (R. Transcript 44); that allegations of punitive damages, if compensatory damages were allowed, would be sufficient (Transcript 44); that allegations based on the Illinois Antitrust Act could not be sustained (Transcript 44-45); that plaintiff's suit was dismissed and plaintiff could not file an amended complaint (Transcript 45); that the Mendelson motion was moot (Transcript 47) and dismissed the action (Transcript 47, R. C 623).

Notice of appeal was filed on July 30, 1982 (R. C 624-629). The Illinois Appellate Court, First District, affirmed the dismissal on November 1, 1983. Lawless v.

Pierce (1983), 118 Ill. App. 3d 747. The Illinois Supreme Court denied appeal on January 31, 1984. Lawless v. Pierce (1984), 99 Ill. 2d (18).

STATUTES: ILLINOIS COURT OF CLAIMS

Illinois Revised Statutes, Ch. 37, Sec. 439.8

"439.8. Jurisdiction

Section 8. The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the state founded upon any law of the State of Illinois

***

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit*** provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant.***"

Illinois Revised Statutes, Ch. 37, Sec. 439.24-5.

"439.24-5. Exhaustion of other remedies for recovery - Exception

Section 25. Any person who files a claim before the court shall, before seeking final determination of his claim exhaust all other remedies and sources of recovery whether administrative or legal;***"